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No. 92-600

In The

Supreme Court of the United States

October Term, 1992

Adoptive Parents of M.N.M.,

Petitioners,

v.

M.J.L.,

Respondent.

On Petition For Writ Of Certiorari
To The District Of Columbia Court Of Appeals

MOTION OF THE NATIONAL COUNCIL FOR ADOPTION AND THE CHILD WELFARE LEAGUE OF AMERICA FOR LEAVE TO FILE BRIEF AND BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS

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MOTION OF THE NATIONAL COUNCIL FOR ADOPTION AND THE CHILD WELFARE LEAGUE OF AMERICA FOR LEAVE TO FILE A BRIEF AMICI CURIAE

The National Council For Adoption ("NCFA") and the Child Welfare League of American ("CWLA") respectfully move, pursuant to Supreme Court Rule 21, for leave to file the attached brief as *amici curiae* in support of the petition for a writ of certiorari. In support of this motion, the NCFA and the CWLA state the following:

Counsel for all parties have been asked to give permission for the filing of this brief in support of petitioners. William F. Hanrahan, counsel for petitioners, consented on their behalf. Harvey Schweitzer, counsel for respondent, declined to consent on his behalf.

The interest of the NCFA in this case arises from the fact that it is a national, voluntary organization concerned with issues affecting adoption. Its fundamental objective is to promote adoption, as a positive option for young, single or troubled parents, by encouraging sound adoption policies and practices. NCFA's membership includes private adoption agencies, adoptive parents, persons who were adopted, biological parents of children adopted by others and interested professionals.

Similarly, CWLA, a federation of 680 child welfare agencies, has long been involved in the development of quality programs and practice in the field of child welfare, including foster care and adoption. CWLA member agencies, located across the United States and Canada, provide comprehensive, quality adoption services to the

child, the birth parent(s) and the adoptive parents. CWLA is committed to adoption as a service for children who need permanent, nurturing and loving homes and long has supported policy, programs and practice that ensure that the best interest of the child is served through adoption.

NCFA and CWLA are particularly concerned about legal developments – legislative or judicial – that affect the timing of adoptive placements of young children or the finality of such placements, once made. Resolution of the issues in this case may seriously affect the law in these areas. In representing these particular interests, NCFA and CWLA advance arguments not presented by petitioners. In addition, NCFA's and CWLA's brief brings to the attention of the Court a recent decision rendered by the Court of Appeals of New York after the petition was filed in a case presenting substantially similar issues to those presented here. NCFA and CWLA believe that their views, reflecting the perspective of adoptive parents,

agencies providing adoption services, and child welfare agencies would be of assistance to the Court.

Respectfully submitted,

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BRIEF AMICI CURIAE OF THE NATIONAL COUNCIL FOR ADOPTION AND THE CHILD WELFARE LEAGUE OF AMERICA IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

Amici curiae are the National Council For Adoption ("NCFA") and the Child Welfare League of America ("CWLA"). NCFA is a nationwide charitable organization, formed in 1980 and headquartered in Washington, D.C. NCFA's fundamental objective is to promote adoption, as a positive option for young, single or troubled parents, by encouraging sound adoption policies and practices. NCFA's members include numerous private adoption agencies and individuals interested in adoption from nearly every state in the country. Those individuals

include adoptive parents, persons who were adopted, biological parents of children adopted by others, and interested professionals.

NCFA monitors legal developments in the adoption field, is involved, through sponsorship of the Council on Accreditation, in the accreditation of adoption agencies and other service providers, gathers and disseminates statistical and practical information and assists individuals and agencies with information concerning pregnancy, out-of-wedlock births, infertility, and other matters related to adoption. NCFA does not purport to advance the interests of only biological mothers or fathers, adopted children, or adoptive parents. Rather, NCFA advocates a balanced, informed and fair consideration of the competing rights and interests of all concerned.

CWLA is a federation of 680 child welfare agencies in the public and voluntary sectors. CWLA is almost three-quarters of a century old and has long been involved in the development of quality programs and practice in the field of child welfare, including foster care and adoption. A substantial number of CWLA member agencies, located across the United States and Canada, provide comprehensive, quality adoption services to members of the adoption triad – the child, the birth parent(s) and the adoptive parents. CWLA is committed to adoption as a service for children who need permanent, nurturing and loving homes and long has supported policy, programs and practice that ensure that the best interest of the child is served through adoption.

The need for finality in the adoption process is a fundamental concern of NCFA and CWLA. That need is served by the one-year statute of limitations embodied in D.C. Code § 16-310 (1989), which appropriately balances the interests of the adoption triad – the child, the birth parents and the adoptive parents. Thirty-one other states have adopted similar limitations periods for the same reason – to protect the finality of adoption decrees.

The Court of Appeals has created a significant and drastic exception to such statutes of limitations. In addition, the Court's decision, in effect, imposes a substantial, and, in some cases, insurmountable burden on adoption agencies to search out and notify putative fathers of adoption petitions in cases where the biological mother either declines or is unable to identify the father or his whereabouts.

As a result, this decision has severe consequences for the adoption process, the adoptive family and the biological mother. The decision places a child in ongoing jeopardy of family disruption based on the wishes of adults who have failed to exercise their rights within a reasonable period of time. Moreover, the right of an adoptive family to nurture and enjoy a new child, and that of the child to be nurtured, without the threat of unreasonable interference, has been shattered. Families that have survived the traumatic period between entry of the adoption decree and the expiration of a statute of limitations must now fear that a putative father whose identity and activities were completely unknown to them may now tear asunder their family unit that has bonded for many many months and even years.

In addition, the decision will inevitably deter relinquishment of out-of-wedlock infants for whom adoption may be the best alternative. It will also delay adoptive placement, pending extraordinary efforts to identify biological fathers who frequently have no desire to be identified, to the detriment of a critical bonding period. And it will discourage adoptive parents from coming forward to participate in the process. The decision could mean that in many cases children, who would otherwise be expeditiously adopted, may be subjected to indefinite periods of inappropriate, detrimental and expensive foster care. This is contrary to the interest of NCFA and CWLA, the families and children they serve, and the Nation itself.

M.N.M. has now been part of her family – her mother, her father and her older brother who was also adopted – for five years. The psychological harm to M.N.M., her parents and her brother from this decision is beyond dispute. Without a reversal or clarification from this Court, the traumatic effects of this decision on the institution of the family may be repeated across the country.

STATEMENT OF THE CASE

The female child, M.N.M., who is the subject of this adoption proceeding was born on July 30, 1987, in St. Louis, Missouri. She was placed with an adoptive family in Washington, D.C., over five years ago on August 20, 1987. Her adoptive parents filed a petition for adoption on November 5, 1987. On April 11, 1988, the Superior Court of the District of Columbia entered a final adoption decree. The statutory

period for filing a challenge to the decree expired one year later on April 11, 1989. Pet. App. 2a-3a.[1]

M.N.M.'s biological mother, L.C.M., consented to the adoption. However, because she would not disclose the name of the biological father, he was not given prior formal notice of the adoption proceeding, and his prior consent was not obtained. Pet. App. 3a-4a. On June 5, 1988, almost two months after the statute of limitations expired, M.J.L., who claims to be the biological father of M.N.M., filed a motion in the adoption proceeding in the Superior Court alleging that his statutory and constitutional rights had been violated. Pet. App. 6a.

L.C.M. and M.J.L. had a relationship while they were seniors in high school in St. Louis, Missouri. During her senior year, L.C.M. became pregnant. She decided to have the child and to place it for adoption. In early June of 1987, she sought adoption counseling with St. Louis Catholic Charities. St. Louis Catholic Charities contacted M.J.L. and his parents to advise them of the possible adoption. M.J.L. objected and expressed a desire to raise the child himself. M.J.L. also contacted the hospital where he expected L.C.M. to give birth and requested that he be notified of the birth. Although L.C.M. did give birth at that hospital shortly thereafter, the hospital did not notify M.J.L. of the birth. Pet. App. 2a-3a, 4a, n.4.

L.C.M. did not agree with M.J.L.'s request to raise the child himself. Instead, within a couple days of the birth,

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[1] The references to "Pet. App." are to the Appendix to the Petition for a Writ of Certiorari.

L.C.M. and her father travelled with M.N.M. to Washington, D.C., where M.N.M. was placed for adoption through Associated Catholic Charities of the Archdiocese of Washington, Inc. ("Catholic Charities"). M.N.M. was placed by Catholic Charities in a preadoptive home on August 4, 1987. L.C.M. signed an affidavit that she did not know the whereabouts of the biological father. M.N.M. was placed with her adoptive family on August 20, 1987. Pet. App. 3a. She has remained with that family for more than five years.

On August 6, 1987, shortly before M.N.M. was placed with her adoptive family, M.J.L. filed a paternity and custody action in St. Louis County, Missouri. That action was subsequently dismissed for lack of jurisdiction and failure to prosecute. M.J.L. refiled the action five months later, in January 1988, in St. Louis City. Thereafter, M.J.L. deposed L.C.M. and her father. Apparently, however, they did not disclose the whereabouts of the child. Nevertheless, in late October 1988, the St. Louis court was advised by the St. Louis County Attorney's Office that there was an adoption proceeding pending in the District of Columbia. Pet. App. 3a-4a.

In early December 1988, four months before the expiration of the statute of limitations in the District of Columbia, M.J.L.'s attorney was advised by the St. Louis court of the adoption proceeding in the District of Columbia. M.J.L. sent a letter, in early January 1989, to a majority of the judges on the Superior Court of the District of Columbia, advising them of his circumstances and requesting that he be notified of any adoption proceedings concerning M.N.M. Pet. App. 4a-5a.

In mid-January, the presiding judge of the family division of the Superior Court of the District of Columbia, Judge Mencher, wrote to the St. Louis judge presiding over M.J.L.'s custody proceeding, Judge Dowd, requesting the pleadings and depositions in that case. On January 23, 1989, M.J.L.'s attorney in St. Louis advised the St. Louis court that M.J.L. intended to file a motion to intervene in the adoption proceeding in the District of Columbia. Pet. App. 5a, 7a.

On June 5, 1989, almost two months after the statute of limitations had expired, M.J.L. filed a motion to intervene in the adoption proceeding, alleging fraud, lack of notice and violation of his constitutional rights. The motion to intervene was denied because the Superior Court found that M.J.L.'s motion was untimely under the one-year statute of limitations of D.C. Code Ann. § 16-310. Pet. App. 6a-8a.

M.J.L. appealed to the District of Columbia Court of Appeals, arguing that Section 16-310, as applied to him, violated his right to Due Process under the Fifth Amendment to the United States Constitution. Pet. App. 54a. The Court of Appeals, with one judge dissenting, agreed and reversed. The Court, at the outset, rejected M.J.L.'s argument that his correspondence with the judges of the Superior Court in January 1989, and thereafter, constituted a pleading "regularly filed" with the Superior Court as required by Section 16-310. Pet. App. 9a. However, the Court then found that M.J.L. had perfected his interest in his parental relationship by his conduct, and, therefore, must be afforded due process. And the Court concluded

that the failure to notify M.J.L. of the filing of the adoption petition deprived him of due process. That deprivation was not, in the Court's view, subsequently remedied when M.J.L. was notified of the proceeding in December 1988, four months before the statute of limitations expired. Pet. App. 16a-19a.

SUMMARY OF THE REASONS FOR GRANTING THE PETITION

The District of Columbia statute of limitations for adoptions, D.C. Code Ann. § 16-310, imposing a one year limit on challenges to a final decree of adoption, reflects the strong public policy favoring the finality of adoptions. The statute properly balances the interests of the state, the adoptive parents and the child in finality with the rights of unwed putative fathers to participate in the adoption proceeding. The statute reflects the legislature's determination of a reasonable amount of time for a putative father, with diligence and good faith, to take whatever measures are necessary to protect his rights.

By striking down the District of Columbia adoption statute of limitations as applied to a putative father who did not receive formal notice of the adoption proceeding, the Court of Apepals has created a substantial and drastic exception to finality, leaving open the possibility that a new family unit can be disrupted at any time. The decision has drastic consequences for the adoption process and is not warranted under the Due Process Clause of the Constitution.

REASONS FOR GRANTING THE PETITION

The Court of Appeals has struck down the District of Columbia adoption statute of limitations, as applied to a putative father, M.J.L., who failed to intervene in the adoption proceeding until after the statute had expired. Although, the putative father had expressed his desire to raise the child when he first learned of the biological mother's intention to place the child for adoption, the mother, L.C.M., who consented to the adoption, did not disclose the whereabouts of the putative father prior to entry of the adoption decree. Accordingly, the adoption court was unable to personally notify the putative father prior to the entry of the adoption decree. In the face of this record, the Court of Appeals held that the Due Process Clause of the Constitution, as applied to the putative father, was violated and that the statute of limitations did not apply to him. The Court of Appeals' decision, by removing the rule of finality from a significant percentage of adoptions, unnecessarily burdens and complicates the adoption process.

Finality is critical to the child and the adoptive parents. The child's need to bond and to form attachments is immediate and crucial to normal development and emotional well-being. Indeed, the terrible and lasting psychological injury to the child caused by interrupting a loving parent-child relationship is well documented. *See* Goldstein, Freud, and Solnit, *Beyond the Best Interests of the Child,* (The Free Press, 1979) at 31-52. As one scholar has noted:

> [T]hose concerned about the welfare of an illegitimate infant cannot keep the child indefinitely in limbo, waiting to see what "functional

> equivalents" of marriage the father will demonstrate if he is given plenty of time. It is not difficult to sense the risks to a child in such circumstances, knowing as we do how much every child needs a sense of continuity and stability in the child-parent relationship.

Hafen, *The Constitutional Status of Marriage, Kinship and Sexual Privacy – Balancing the Individual and Social Interests*, 81 Mich. L. Rev. 463, 498-99 (1983). *See also* Buchanan, *The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson*, 45 Ohio St. L.J. 313, 364 (1984) (A child's "need for early assurance of permanence and stability is an essential factor in the constitutional determination of whether to protect a parent's relationship with his or her child.").

The adoptive parents also have a strong interest in the finality of the adoption. They assume the burden of developing an interdependent family relationship with an adopted child and have a significant interest in continuing the relationship. *See Lehr v. Robertson*, 463 U.S. 248, 263-266, 266 n. 25 (1983); *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 834-47 and n. 51 (1977). *See also Wells v. Children's Aid Society*, 681 P.2d 199, 203 (Utah 1984). The Wells court accurately observed:

> If infants are to be spared the injury and pain of being torn from parents with whom they have begun the process of bonding and if prospective parents are to rely on the process in making themselves available for adoptions, such determinations [of whom will assume the parental role] must also be final and irrevocable.

Id. at 206-07.

Moreover, if the interests of the adoptive parents are not recognized by a statutory finality through the adoptive process, it will deter other prospective parents from participating in that process. *Id.* Indeed, it was for that reason, among others, that Congress enacted a finality provision to the adoption process in the District of Columbia and declared that, among its purposes, was the " . . . socially necessary and desirable protection . . . of . . . the adopting parents . . . [by] protecting them from subsequent disturbance of their relationships with the child by natural parents." 68 Stat. 240, 241 (1954).

Of course, the need for finality, and the interests of the adopted child and the adoptive parents, must be reconciled with the rights of unwed biological fathers to participate in the adoption process. That right was first recognized under the Due Process Clause of the Constitution in 1972. *Stanley v. Illinois,* 405 U.S. 645 (1972). However, it was subsequently held that a biological relationship, standing alone, does not automatically merit due process protection. *Lehr v. Robertson,* 463 U.S. at 262. Instead, the Constitution imposes a burden on a putative father to demonstrate by affirmative acts that he has seized the opportunity to develop a relationship with his child in order to merit due process protection. *Id.* Nothing in the Constitution prohibits a legislature from requiring a putative father to make that demonstration within a specified period of time.

The statute of limitations here, which imposes finality on an adoption decree only after it has been in effect for one year, embodies the legislature's effort to balance and safeguard the rights of all interested parties in an

adoption. On the one hand, the adoptive parents and the adopted child are assured that the period of uncertainty for their newly formed family is limited to one year. On the other hand, a putative father has an opportunity to assert whatever rights he may possess, provided he does so within that statutory period. Thus, none of the rights of the parties to the adoptive process are unrecognized in the District of Columbia adoption statute, and the parties may assert their rights within the one-year limitations period.

The Court of Appeals struck down the District of Columbia statute of limitations without citing any authority for the proposition that a Constitutional claim cannot be forfeited if not timely raised. In striking down the statute, the Court expressly held that there was no "equitable tolling" principle that suspended application of the statute of limitations. Nor, indeed, did Congress, in enacting the statute, expressly recognize any exception to the finality rule for putative fathers with statutory or Constitutional claims. Nevertheless, the Court concluded that in circumstances where the putative father's identity has not been disclosed by the birth mother, and, therefore, the putative father did not receive formal notice of the filing of the adoption proceeding, the statute of limitations did not apply.

Certainly, M.J.L.'s efforts to be heard on the adoption of M.N.M., at first glance, garner sympathy and perhaps even admiration. Yet, we do not believe that whatever interests he may have in opposing the adoption of M.N.M., on balance, outweigh the interests of M.N.M. and her adoptive parents in continuing a family relationship that is now more than five years old. Indeed, we do

not believe, for the reasons already asserted, that the rights of the putative father survived after one year from the entry of the adoption decree. And we do not believe that this one-year limitation, as applied in this case, suffers from any Constitutional infirmities.

In sum, the State has a legitimate interest in promoting an adoption process that addresses the child's need for stability and ensures the participation of biological and adoptive parents. The importance of this societal interest was recently underscored by the New York Court of Appeals which resolved a similar controversy by declining to permit a biological father to intervene in an adoption proceeding after the adoption had become final. *In the Matter of Robert O. v. Russell K.*, No. 191, 1992 N.Y. Lexis 3478 (N.Y. Oct. 27, 1992).[2] As the New York court stated:

> States have a legitimate concern for prompt and certain adoption procedures and their determination of the rights of unwed fathers need not be blind to the "vital importance" of creating adoption procedures possessed of "promptness and finality," promoting the best interests of the child, and protecting the rights of interested third parties like adoptive parents (*Lehr v. Robertson*, [463 U.S. 248, 263-66, n. 25]). . . . To conclude that petitioner acted promptly once he became aware of the child is to fundamentally misconstrue whose timetable is

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[2] In *Robert O.*, the biological mother became pregnant, gave birth and placed the child for adoption, all without informing the biological father who was not entitled to notice under the New York adoption statutes. The couple subsequently married and only then did the mother tell her husband of the birth and adoption. The father promptly sought to set aside the adoption decree, which had become final ten months earlier.

> relevant. Promptness is measured in terms of the baby's life not by the onset of the father's awareness. The demand for prompt action by the father at the child's birth is neither arbitrary nor punitive, but instead a logical and necessary outgrowth of the State's legitimate interest in the child's need for early permanence and stability. . . .

Robert O., 1992 N.Y. Lexis 3478 at 11-12.

The District of Columbia's statute of limitations embodies the legislature's judgment in balancing the competing interest of the child, the adoptive parents, and the biological parents. The statutory one-year period, which does not commence until after the final adoption decree is entered, is the legislature's determination of a reasonable amount of time for the putative father, with diligence and good faith, to take whatever measures are necessary to protect his rights.

The Court of Appeals' decision which, in effect, permits unwed putative fathers to override the interests of all other parties in finality whenever the fathers' identities are not disclosed prior to entry of the adoption decree will have a devastating effect on the adoption process.[3] Biological

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[3] The complications presented by permitting evasion of the limitations period are clearly illustrated here: Over a year and a half after M.N.M. came to live with her adoptive parents, M.J.L. threw their lives into disarray by seeking to intervene in the adoption. They have now been a family unit for over five years. As this case illustrates, when a putative father seeks to undo an adoption after the limitations period has expired, he will most likely meet with resistance and litigation. Practically, such litigation will only be resolved after months and years with harrowing results for the adopted child and the child's adoptive family.

mothers often do not know or even decline, in the exercise of their privacy rights, to disclose the identity or whereabouts of putative fathers in a significant percentage of adoptions. The potentially widespread effect that this decision may have on future, pending and even finalized adoptions counsels intervention by this Court to reverse or clarify the Court of Appeals' decision.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition should be granted.

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